pressed"—was made part of the framework of the statute by Congress itself when it provided separate procedures for resolving the two types of controversy. Compare Sections 9(b) and (c) with Sections 10(c) and (k).[2]

The Board cannot clarify a certification in the absence of a prior certification. *Bell Telephone Company of Pennsylvania*, 118 NLRB 371; *American Stores Company*, 130 NLRB 678. Many bargaining representatives, of course, operate without Board certification; see *United Mine Workers* v. *Oak Flooring Company*, 351 U.S. 62. The rationale of the decision below therefore creates the paradox that a non-certified union can obtain judicial enforcement of its recognition clause but a certified union is restricted to the processes of the Board.

Since this case constitutes a dispute over the assignment of work rather than over representation, it is therefore more closely akin to a jurisdictional dispute than to a question over certification. But it is nonetheless not a jurisdictional dispute in the sense of Section 8(b)(4)(D) and Section 303, for, as the Court of Appeals for the Second Circuit recognized in *Local 33 of the International Hod Carriers Union* v. *Mason Tenders District Council*, 291 F.2d 496, 504 (2nd Cir. 1961):

> "It is obvious from reading these sections that this statutory scheme does not purport to give the Board general supervisory powers over controversies between labor organizations relating to work assignments. The Board may act only when a charge has been filed, and

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[2] Of course, the court below was also in error by asserting that "it is appropriate" that the Labor Board's jurisdiction over jurisdictional disputes "be exclusive." *N.L.R.B.* v. *Radio Engineers*, 364 U.S. 573 expressly held that Congress by allowing private damage suits in Section 303 has removed jurisdictional disputes from the exclusive domain of the Board, 364 U.S. at 584-585 following *Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237.

a mere disagreement over work assignments is not enough to create an unfair labor practice. Before a labor organization can be said to have violated Section 8(b)(4)(D), it must have engaged in one of the activities proscribed in Section 8(b)(4)(i) and (ii).'

* * *

Moreover a reading of Section 10(k) of the National Labor Relations Act, 29 U.S.C.A. Section 160(k), above cited reveals the emphasis which Congress has placed on voluntary adjustment of work assignment disputes and dispels any notion that uniformity of decision is a paramount consideration in this area, for certainly the results reached in voluntary adjustments such as those in arbitration will not always be the same the Board would have reached if it had heard a particular case. We think that to hold that the District Court has no jurisdiction would run counter to the position which Congress has accorded to voluntary adjustments."

Since the I.A.M. has not engaged in the conduct prohibited by Section 8(b)(4)(D), the N.L.R.B. would not have jurisdiction to resolve its claim. The decision of the Court below will contribute to economic conflict since "the denial of arbitration would have the paradoxical result of forcing the Union to engage in conduct prohibited by 8(b)(4)(D) as the only means of obtaining adjudication of its claim to this work." *Carey* v. *General Electric Co.*, F. Supp. , (S.D.N.Y. April 18, 1962); 50 LRRM 2119, 2132.

Moreover, it would require the union to risk a damage suit under Section 303 in order to obtain an adjudication from the Board under the jurisdictional dispute procedures. Indeed, as this Court noted in the *Radio Engineers* case, 364 U.S. 573, the Board has adopted the policy—which we believe is required by the statute—that it will not adjudicate a jurisdictional dispute where a union is entitled to the

work under its collective bargaining agreement. 364 U.S. 573, 577, n. 12.

Properly viewed this litigation involves neither a question of representation nor a jurisdictional dispute. It is essentially a controversy regarding the meaning of a contract, more particularly as to the contractual obligation of Raytheon to assign work encompassed by the agreement to the employee-members of the petitioner.[4] The question is the same whether the work which the union claims under its agreement is assigned to other employees as here or is contracted to another employer for processing by the latter's employees, as in the typical subcontracting situation. In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 this Court observed that the latter disputes are "grist in the mills of the arbitrators". This case is nothing more or less than a suit to enforce arbitration of a grievance which is indistinguishable from that in *Warrior & Gulf* in its practical effect on the preservation of work standards for which the union had bargained.

The District Court held that the grievance was subject to arbitration in accordance with the principles announced by this Court. The Court below did not disturb this finding. Accordingly, "arbitration should have been ordered." *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564, 573. To compel this employer to live up to his

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[4] See *Continental Can Co.*, 37 L.A. 738, 740 (1961) where the arbitrator said:

> "What seems to be involved here is whether, taking the contract as we find it between the Company and the Grievant Local Union, the Company has wrongfully allocated the work to others than the grievants. This not being a matter of defining a bargaining unit, *per se*, it looms simply as a question of whether or not the Company violated the Grievants' agreement. In Labor Arbitration Reports 24.57 there are a great many decisions of arbitrators in this sphere, and they do not find that there is any transgression of N.L.R.B. territory. It is simply a matter of interpreting the contract between the parties before the Arbitrator, and as such, this Arbitrator must confront that issue."

commitment to arbitrate would in no way interfere with the orderly processes of the Board. See Fuld, J. dissenting in *Carey* v. *Westinghouse Electric Corporation*, N.Y. Ct. Appeals, July 1962; 50 LRRM, 2740 at 2742. The views of the Court below that the submission of this dispute to the arbitrator—as the parties had agreed—would create a conflict with the Board arose from the Court's misunderstanding of the nature of the suit. In any event, this Court has made crystal clear that the possibility of such a conflict provides no basis for the federal district courts to deny a party the judicial remedy which Congress provided in Section 301.

Conclusion

It is respectfully submitted that, for the reasons above stated, this Petition for a Writ of Certiorari should be granted.

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Appendix "A"

United States Court of Appeals
For the First Circuit

No. 5975.

LOCAL NO. 1505 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

INTERVENOR, APPELLANT,

v.

LOCAL LODGE NO. 1836 OF DISTRICT 38 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL.,

APPELLEES;

No. 5976.

RAYTHEON COMPANY,

DEFENDANT, APPELLANT,

v.

SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before HARTIGAN and ALDRICH, *Circuit Judges*, and WYZANSKI, *District Judge*.

Donald Stahl, with whom *Timothy J. Murphy* was on brief, for Local No. 1505 International Brotherhood of Electrical Workers, AFL-CIO.

Paul F. Hannah and *Robert L. Molinar* for Raytheon Company.

Arthur J. Flamm, with whom *Segal & Flamm* was on brief, for Local Lodge No. 1836 of District 38 of the International Association of Machinists, AFL-CIO.

OPINION OF THE COURT.

June 4, 1962

ALDRICH, *Circuit Judge*. This is an action to compel arbitration. In 1946 Local No. 1505, International Brotherhood of Electrical Workers, AFL-CIO (IBEW), was certified as the bargaining representative for all production and maintenance employees at certain plants operated in Massachusetts by Raytheon Manufacturing Company, now Raytheon Company. In 1952 Local Lodge No. 1836 of District 38 of the International Association of Machinists, AFL-CIO (IAM), was certified as representatives for certain machinists theretofore included in the IBEW bargaining unit. Both unions since certification have maintained collective bargaining agreements with Raytheon. IAM's contains extensive provisions for arbitration.[1] The record does not show, but it was asserted during argument and not contradicted, that IBEW's does also. In 1958 IAM demanded that certain work hitherto performed by members of IBEW be taken away and assigned to IAM members. Raytheon declined and, following unsuccessful grievance procedure, IAM requested arbitration. Upon the rejection of that request IAM brought the present action against Raytheon. The court permitted IBEW to intervene. However, upon cross motions for summary judgment the court thereafter ordered bilateral arbitration, denying IBEW's request to participate. Raytheon and IBEW appeal.

We consider first IBEW's claim. Concededly, even if it has an agreement to arbitrate, it is not an agreement to arbitrate with IAM. During oral argument we asked IAM how, nevertheless, it could be injured by tripartite arbitration. Counsel admitted he could think of no harm, but insisted that arbitration is purely a matter of contract and

[1] These provisions do not in specific terms cover the present situation, and Raytheon points to other provisions which it says preclude arbitration. We do not reach this issue.

that it has a contractual right to arbitrate with Raytheon alone. In view of the factual situation this obviously would not make arbitration a true instrument for industrial peace. However, we need not consider whether, regardless of IAM's contentions, we have authority to adopt equitable measures, because we think there is another solution to the difficulties it insists upon creating or, at least, insists on not avoiding. We believe that exclusive jurisdiction to resolve the conflict between the parties is in the Labor Board whose certifications have permitted these overlapping claims.[2]

It is true that no unfair labor practice may have been committed. *Cf. Tacoma Printing Pressmen's Union*, 1961, 131 N.L.R.B. 1090. Even had there been, this might not pre-empt the district court's jurisdiction under 29 U.S.C. §301. *Cf. United Steelworkers of America* v. *New Park Mining Co.*, 10 Cir., 1959, 273 F.2d 352; *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 3 Cir., 1956, 235 F.2d 401. See also Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II, 59 Colum. L. Rev. 269, 282 (1959). But we cannot agree with IAM's contention that the issue does not involve a matter of representation. Its basic demand was predicated upon the company's alleged violation of the recognition clause. IAM protests that it is not seeking to represent other employees; it merely wishes their work. We are not impressed by this distinction. Certification and representation are both bottomed on work categories. On the facts here alleged a decision by the arbitrator in IAM's favor, if erroneous, would invade IBEW's certification. Arbitration, by IAM's

[2] As is customary in actions to compel arbitration IAM does not submit the merits of the controversy to the court, but says that this is an issue for the arbitrator. We need not consider how we would decide if IAM showed that its certification was so unambiguous that there was nothing for the Board to resolve.

own admission, is but a matter of contract. A union by contract with an employer cannot define the scope of its certification; that is the Board's function.[3] Not only has the Board in the past made necessary clarifications, *St. Regis Paper Co.*, 1961, 130 N.L.R.B. 1235, but jurisdictional disputes between unions are precisely its province. *NLRB v. Radio & Television Broadcast Engineers Union*, 1961, 364 U.S. 573. It is appropriate that this jurisdiction be exclusive. See Meltzer, *op. cit. supra*, at 299. The case relied upon by the court below, *Local 33, International Hod Carriers Union v. Mason Tenders District Council*, 2 Cir., 1961, 291 F.2d 496, involved an intra-union dispute between two locals of no possible Board concern, and is inapposite for reasons stated in the opinion. See 291 F.2d at 503.

Judgment will be entered reversing the judgment of the District Court and ordering the complaint dismissed.

OPINION OF THE COURT.

On Petition for Rehearing or to Amend Order.

July 19, 1962.

Aldrich, *Circuit Judge*. We write this opinion on IAM's petition for rehearing not because any opinion is required, but to record our special objections to the petition. The bar should understand that such petitions are to be filed only in unusual circumstances. In the absence of clear error they are not to be used to reargue matters already argued and determined. Conversely, they are not for the

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[3] As the court said in this respect in *Portland Web Pressmen's Union v. Oregonian Publishing Co.*, 9 Cir., 1960, 286 F.2d 4, 9, *cert. den.* 366 U.S. 912, "the parties could not by private agreement take away from the Board the right to make those determinations." See also *International Chemical Workers Union v. Olin Mathieson Chemical Corp.*, D.C.S.D. Ill., 1962, 202 F.Supp. 363, 365; *International Union of Doll & Toy Workers v. Metal Polishers Union*, D.C.S.D. Cal., 1960, 180 F.Supp. 280.

purpose of presenting matters which should have been but, without good cause, were not argued before, *Carl* v. *FTC*, 1 Cir., 1962, 302 F.2d 688, 691, and particularly they are not, as here, to be used to introduce a record which was not even presented below.

Although Raytheon and IBEW argued fully the jurisdictional issue upon which we subsequently rested our decision, IAM now seeks for the first time to call to our attention certain proceedings occurring before the Board in 1953 which it says are pertinent to this issue. As presently recited the extent of this pertinency is not fully clear. In the absence of palpable error, and because of manifest untimeliness, we will not consider them.

Secondly, although IAM appears to recognize that we have held that resolution of an amibiguity in its certification is a matter exclusively for the Board in spite of the fact that pre-emption, as such, does not apply to actions under section 301, *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 1962, 369 U.S. 95, 101 fn. 9, in the same breath it asks us, to save expense, to amend our mandate to order the district court to retain jurisdiction "in the event the Board should hold that it has no jurisdiction over this dispute." The only circumstance we can presently think of under which the Board might be said to lack "jurisdiction" would be if no ambiguity exists, a matter we have previously adverted to, fn. 2, *supra*. Such a contention would be inconsistent with IAM's position hitherto, and it is too late to advance it now.

The petition for rehearing is denied.

Appendix "B"

STATUTORY PROVISIONS INVOLVED

SEC. 8

(b) It shall be unfair labor practice for a labor organization or its agents—

(4)(i) to engage in; or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

SEC. 9.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

SEC. 10.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless,

within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

SEC. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.